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Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, DC

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

DOCKET FILE COPY ORIGINAL

In the Matter of )  
)  
**MARC SOBEL** )  
)  
Applicant for Certain Part 90 Authorizations )  
in the Los Angeles Area and Requestor Of )  
Certain Finder's Preferences )  
)  
**MARC SOBEL AND MARC SOBEL** )  
**D/B/A AIR WAVE COMMUNICATIONS** )  
)  
Licensees of Certain Part 90 Stations in the )  
Los Angeles Area )

WT DOCKET NO. 97-56

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MAR 12 2002

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

To: The Commission

**ENFORCEMENT BUREAU'S OPPOSITION  
TO  
PETITION FOR RECONSIDERATION**

1. On February 25, 2002, Marc Sobel ("Sobel") and James A. Kay, Jr. ("Kay") filed a Petition for Reconsideration ("*Petition*") of the Commission's *Decision*, FCC 01-342 (released January 25, 2002) in the above-captioned matter. The Enforcement Bureau hereby opposes the *Petition*.<sup>1</sup> The Bureau submits that the Commission's decision in this matter is appropriate, and that the *Petition* should be denied.

<sup>1</sup> This pleading is timely filed, pursuant to Section 1.4 of the Commission's rules, 47 C.F.R. § 1.4. Although the Petition for Reconsideration to which the instant Opposition is being interposed states that it was transmitted to Bureau counsel by mail and facsimile, in fact it was mailed on February 25, 2002, and transmitted via e-mail (without attachments) on February 26, 2002.

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List A B C D E

## **I. THE COMMISSION PROPERLY RESOLVED THE CONFLICT BETWEEN THE TWO UNDERLYING INITIAL DECISIONS**

2. Sobel's and Kay's initial claim that the Commission improperly resolved a conflict between Judge Chachkin's Initial Decision in the Kay hearing<sup>2</sup> and Judge Frysiak's Initial Decision in the Sobel hearing<sup>3</sup> lacks merit. Sobel and Kay argue that Judge Chachkin's Initial Decision should be recognized as more authoritative because, among other things, the Kay hearing lasted longer than the Sobel hearing and Judge Chachkin would not have lightly disputed an earlier decision of a fellow judge.<sup>4</sup> None of the claims warrants reconsideration of the Commission's *Decision*.

3. In both the Commission's *Decision* in this case and in a companion decision, *James A. Kay, Jr.*, FCC 01-342 (released January 25, 2002) ("*Kay Decision*"), the Commission expressly acknowledged the conflict between the two Administrative Law Judges' Initial Decisions.<sup>5</sup> In so doing, the Commission properly decided not to give greater deference to either one. Instead, it critically examined the evidence and resolved the conflict based on the records in the two proceedings. The Kay hearing appropriately lasted longer than the Sobel hearing given the

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<sup>2</sup> *Initial Decision of Administrative Law Judge Joseph Chachkin*, FCC 99D-04 (released September 10, 1999) ("*Chachkin I.D.*").

<sup>3</sup> *Initial Decision of Administrative Law Judge John M. Frysiak*, 12 FCC Rcd 22879 (1997) ("*Frysiak I.D.*").

<sup>4</sup> *Petition*, pp. 1-4.

<sup>5</sup> *Decision*, ¶ 10.

number of issues to be decided. However, the Kay hearing did not include the issue to determine whether Kay engaged in an unauthorized transfer of control of Sobel's stations, in violation of Section 310(d) of the Communications Act of 1934, as amended. That issue was specified, tried, and resolved adversely to Sobel and Kay in the Sobel hearing. The issue relating to this matter in the Kay hearing inquired into the effect of Kay's violation of Section 310(d) on his qualifications to be and remain a Commission licensee. Moreover, to the extent that Judge Chachkin made findings contrary to those of Judge Frysiak, the Commission recognized that Judge Chachkin's findings contained profound errors, which cast serious doubt on his conclusions. For example, the Commission flatly rejected findings by Judge Chachkin that counsel for the Wireless Telecommunications Bureau had engaged in prosecutorial misconduct by somehow concocting an "elaborate scheme" to conceal information from Judge Frysiak.<sup>6</sup> In addition, the Commission found no basis for affording deference to Judge Chachkin's findings on the credibility of the testimony provided by Messrs. Sobel and Kay, given the Commission's "own independent assessment of the nature of the representations made and the circumstances that were involved."<sup>7</sup> While credibility and demeanor findings ordinarily are afforded deference, they may be rejected, *as was the case here*, where they are patently in conflict with the record evidence.<sup>8</sup> As discussed

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<sup>6</sup> *Kay Decision*, ¶ 89.

<sup>7</sup> *Kay Decision*, ¶ 86.

<sup>8</sup> In *Milton Broadcasting Company*, 34 FCC 2d 1036, 1045 (1972), the Commission stated, "While we are reluctant to overturn the findings of a hearing examiner, particularly where, as here, many of his findings are based on his assessment of the credibility of the witnesses, we would be derelict in our statutory duty to act in the public interest if we were to accept findings which are patently in conflict with what we find to be the facts as established by the record."

in the Commission's *Decision*, Sobel and Kay deliberately submitted false and misleading reports to the Commission notwithstanding Judge Chahckin's impression that that they did not intend to deceive the Commission.<sup>9</sup>

## II. REVOKING SOBEL'S LICENSES DID NOT VIOLATE THE APA

4. There also is no merit to Sobel's and Kay's argument that the Administrative Procedure Act ("APA") prohibits the revocation of Sobel's licenses without prior notice and an opportunity "to demonstrate or achieve compliance . . . ." <sup>10</sup> The Commission held that Sobel's conduct relating to the transfer of control of stations to Kay was willful.<sup>11</sup> Sobel and Kay argue otherwise. Their argument essentially turns on the definition of the term "willful" that should apply to Section 9(b) the APA. Sobel and Kay argue that the Commission erred when it held the definition of "willful" that applies to Section 9(b) of the APA in FCC-related cases is the same definition that applies to Section 312 of the Communications Act of 1934 as amended. This definition requires that the licensee intended to do the things that constituted the violation. It does not require that the licensee deliberately intended to commit a violation. Kay and Sobel

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<sup>9</sup> *Decision*, ¶ 74.

<sup>10</sup> Section 9(b) of the APA, 5 U.S.C. § 558(c). This section states in pertinent part that except in cases where conduct is willful or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given (1) notice by the agency in writing of the facts or conduct which may warrant the action; and (2) opportunity to demonstrate or achieve compliance with all lawful requirements.

<sup>11</sup> *Decision*, ¶ 8.

claim that this definition is inconsistent with the spirit and intent of the APA.

6. The Bureau believes that the Commission applied the proper definition of the term “willful” in this case, and Kay’s and Sobel’s argument lacks merit. As the Commission explained in its *Decision*, in the absence of a definition of the term “willful” in the APA, it is appropriate to refer to the definition used in the substantive statute involved, in this case, the Communications Act.<sup>12</sup> Indeed, various courts have heretofore applied similar definitions of the term “willful.” See *Finer Foods Sales Co., Inc. v. U.S.D.A.*, 708 F.2d 774, 778 (D.C. Cir. 1983) (“Under [the Perishable Agricultural Commodities Act], an action is willful if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements.”); *Lawrence v. Commodity Futures Trading Commission*, 759 F.2d 767, 773 (9th Cir.1985) (The agency's burden was to show petitioner's "actions were intentional as opposed to accidental.”); *Koden v. United States*, 564 F.2d 228, 234 (7th Cir.1977) citing *Goodman v. Benson*, 286 F.2d 896, 900 (7th Cir.1961) (Willfulness has been defined as the (1) intentional performance of an act which is prohibited, irrespective of evil motive or reliance on erroneous advice, or (2) action which carelessly disregards statutory requirements.).

### **III. SOBEL LACKED CANDOR IN HIS SUBMISSION’S TO THE COMMISSION**

7. The Commission correctly determined that Sobel lacked candor in his dealings with

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<sup>12</sup> *Decision*, p. 4.

the Commission. Lack of candor is a concealment, evasion, or other failure to be fully informative which is accompanied by an intent to deceive the Commission. Sobel and Kay assert that Sobel did not act with deceptive intent.<sup>13</sup> The Commission, at paragraph 74 of its *Decision*, specifically found that Sobel was not forthcoming with material information at a time when he was obligated to do so. Nothing in the *Petition* demonstrates otherwise.

9. The Sobel affidavit that was filed with Kay's motion in the Kay proceeding asserted that Kay and Sobel were completely independent, that Kay did not hold any interest in Sobel's stations, and that Sobel was not an employee of Kay. The affidavit was false and misleading, and was motivated by a desire to avoid Commission scrutiny of Sobel's relationship with Kay. Sobel's affidavit lacked candor in that he failed to provide an accurate picture concerning his relationship with Kay. The Stanford letter exacerbated this problem, and demonstrated a pattern of deceptive conduct.

10. Sobel asserts that he was thinking more about "the vast majority" of his stations that

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<sup>13</sup> Intent may be shown in several ways. "[T]he fact of misrepresentation coupled with proof that the party making it had knowledge of its falsity [is] enough to justify a conclusion that there was fraudulent intent." *Leflore Broadcasting Co. Inc. v. FCC*, 636 F.2d 454, 462 (D.C. Cir. 1980). It can be inferred when a party has a clear motive to deceive. *See, e.g., RKO General, Inc.*, 4 FCC Rcd 4679, 4684 (Rev. Bd. 1989). Intent may also be found by examining surrounding circumstances, even if there is no direct evidence of intent to deceive. *American International Development, Inc.*, 86 FCC 2d 808, 816 n. 39 ("The Board is correct that the absence of direct evidence of motive is not significant where the record otherwise clearly establishes that deceptive conduct has occurred.").

were independent of Kay when he wrote the affidavit and the Stanford letter.<sup>14</sup> This highlights rather than lessens Sobel's duty to tell the Commission which stations Kay managed, and which were independent. Sobel was aware that the Commission was inquiring into which stations Kay operated, including those licensed to Sobel.<sup>15</sup> Under such circumstances, Sobel "had an affirmative obligation to inform the Commission of the facts the FCC needed in order to license" him. *RKO General, Inc. v. FCC, supra*, 670 F.2d 215, 229 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 927 (1982). Sobel had a clear and unambiguous duty to fully inform the Commission of his relationship with Kay. Indeed, if Sobel truly believed that his relationship with Kay was appropriate and in full compliance with the Commission's rules, Sobel had every incentive to come forward and explain that Kay managed particular stations pursuant to a written management agreement, and to provide a copy of the management agreement.

#### **IV. JUDGE CHAHKIN'S FINDINGS ON THE TRANSFER OF CONTROL ISSUE WERE UNAUTHORIZED**

11. Sobel and Kay again assert that the Commission should consolidate the Kay and Sobel hearings.<sup>16</sup> Specifically, they ask the Commission to adopt Judge Chachkin's findings on the transfer of control issue even though, as discussed above, that issue was not specified in the Kay hearing. The Bureau submits that Judge Chachkin's findings on the matter were not only

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<sup>14</sup> *Petition*, pp. 13, 14, 15, 17, 18 and 20.

<sup>15</sup> *Decision*, ¶ 11.

<sup>16</sup> The Commission issued companion decisions in the Kay and Sobel proceedings and dismissed as moot Sobel's request to defer and consolidate the hearings. *Decision*, ¶ 10

patently erroneous, they went beyond the scope of the transfer of control issue specified in the hearing over which he presided.<sup>17</sup>

## V. SOBEL'S REQUEST FOR INQUIRY AND INVESTIGATION

12. Sobel and Kay argue that the *Decision* failed to adequately address the arguments presented in Sobel's *Revised Request for Inquiry and Investigation*.<sup>18</sup> The Commission explained that it has reviewed the request, considered the arguments and found that no further action is warranted.<sup>19</sup> This decision by the Commission on a request to conduct an investigation is entirely discretionary.<sup>20</sup> The Bureau submits that Sobel and Kay have not presented any arguments or new information in their *Petition* that warrants reconsideration of the matter by the Commission.<sup>21</sup>

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<sup>17</sup> See *Memorandum Opinion and Order*, FCC 98M-26 (Judge Sippel, released March 5, 1998); see also *Chachkin I.D.*, pp. 3, 44 and 66, n.48.

<sup>18</sup> See *Petition*, pp. 25-26; see also *Decision*, ¶ 9.

<sup>19</sup> *Decision*, ¶ 9.

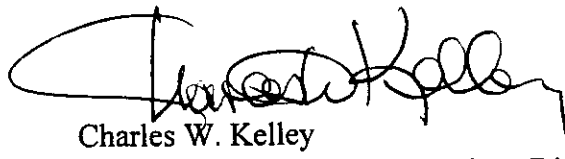
<sup>20</sup> *In re Applications of The New Continental Broadcasting Company et al.*, 93 FCC 2d 1275, 1277 (1983) ("In our view, there is insufficient factual basis to warrant a Section 403 inquiry. Section 403 affords us broad discretion to determine whether to institute such an investigation.")

<sup>21</sup> Notwithstanding the foregoing, the Bureau continues to believe that Sobel's *Revised Request for Inquiry and Investigation* was an improper and untimely attempt to supplement Sobel's exceptions in this matter. To the extent that Sobel objects therein to the revocation of his licenses, the Bureau objects to Sobel's and Kay's attempt to incorporate their 55 page pleading by reference in their *Petition*.

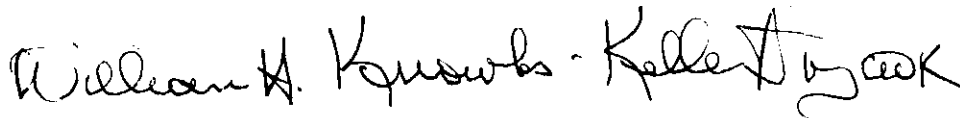
## V. Conclusion

13. The Bureau submits that contrary to the assertions made by Sobel and Kay, the Commission's decision in this matter is appropriate and fair, and that the Petition for Reconsideration should be denied.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Charles W. Kelley". The signature is fluid and cursive, with a large initial "C" and a stylized "K".

Charles W. Kelley  
Chief, Investigations and Hearings Division  
Enforcement Bureau

A handwritten signature in black ink, appearing to read "William H. Knowles-Kellett". The signature is fluid and cursive, with a large initial "W" and a stylized "K".

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March 12, 2002

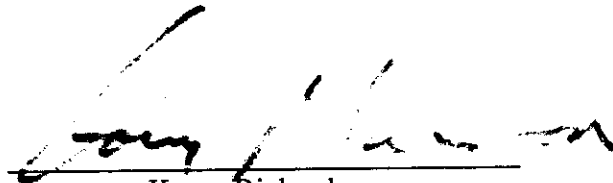
## CERTIFICATE OF SERVICE

I, Karen Richardson, a legal technician in the Investigations and Hearings Division, Enforcement Bureau, certify that I have, on this 12th day of March 2002, sent by first class mail (unless otherwise indicated), copies of the foregoing "Enforcement Bureau's Opposition to Petition for Reconsideration" to:

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